

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

To be argued by
GERALD GORDON

75-7608

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P/S

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT
Docket No. 75-7608

IRVING SANDERS, *Plaintiff-Appellee*,
—against—

LEON LEVY, *et al.*, *Defendants-Appellants*.

EGON TAUSSIG, *Plaintiff-Appellee*,
—against—

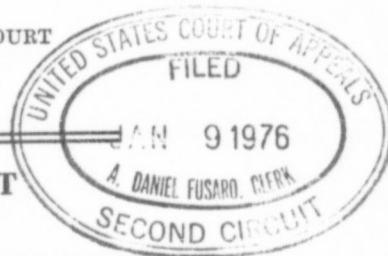
SIDNEY M. ROBBINS, *et al.*, *Defendants-Appellants*.

MICHAEL SHAEV and RITA SHAEV, *Plaintiffs-Appellees*,
—against—

ERIC HAUSER, *et al.*, *Defendants-Appellants*.

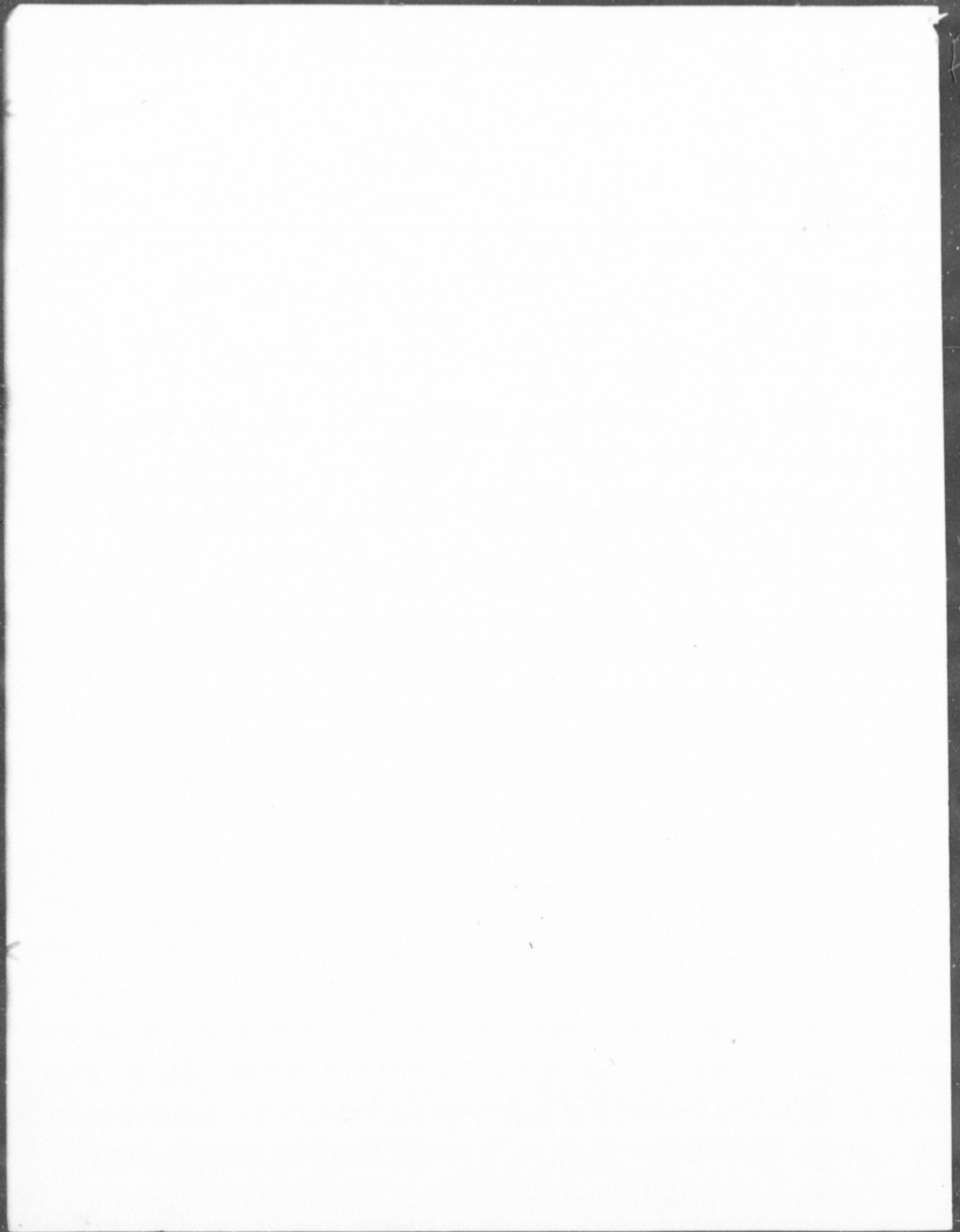
ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF FOR DEFENDANT-APPELLANT
OPPENHEIMER FUND, INC.**



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POINT I

IN A CLASS ACTION, THE SUBSTANTIAL COST OF IDENTIFYING MEMBERS OF THE CLASS FOR THE PURPOSES OF ENABLING PLAINTIFFS TO SEND THE INITIAL CLASS NOTICE REQUIRED BY FRCP 23(c)(2) IS A PART OF THE COST OF NOTICE TO BE BORNE BY PLAINTIFFS.

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ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLANT
OPPENHEIMER FUND, INC.

QUESTIONS PRESENTED

The issues presented to the Court for review
here are whether:

1. In a class action, is the substantial cost of identifying class members for the purpose of enabling plaintiffs to send the initial class notice required by FRCP 23(c)(2) a part of the cost of notice to be borne by plaintiffs or may the defendants (or some of them) be required to pay such costs of identification? Plaintiffs have indicated that they will not maintain the actions if they must bear such identification costs.

2. Is this action manageable as a class action?

STATEMENT OF THE CASE

This is an appeal under 28 U.S.C. 1291 by defendant, Oppenheimer Fund, Inc. (the "Fund"), and other defendants from so much of a decision and order of Judge Thomas P. Griesa dated September 30, 1975, filed October 1, 1975 (A-188-90) ¹ of the United States District Court for the Southern District of New York as denied their motions for reargument of Judge Griesa's decision of May 15, 1975 (A-169-79). ²

¹ References to pages of the Joint Appendix are set forth as "A-").

² The decision is appealable under the "equality of treatment" suggested by Judge Friendly in Korn v. Franchard Corp., 443 F.2d 1301, 1307 (2d. Cir. 1971), expanded upon in Eisen v. Carlisle & Jacquelin, 479 F.2d. 1005, 1007 (2d. Cir. 1973) ("Eisen III") vacated and remanded 417 U.S. 156 (1974), explained in depth in Herbst v. International Telephone and Telegraph Corp., 495 F.2d. 1308, 1311-1315 (2d. Cir. 1974) and most recently followed and explained in Parkinson v. April Industries, Inc., 520 F. 2d. 650, 656 (2d. Cir. 1975). See also Eisen v. Carlisle & Jacquelin, 417 U.S 156, 169-172 (1974) ("Eisen IV").

A. The Nature of this Action

Between March and August, 1969, three separate substantially similar class actions were filed by plaintiffs, Irving Sanders, (A-10-21) Egon Taussig (A-22-37) and Michael and Rita Shaev, (A-38-46) respectively, naming as defendants the Fund, the Fund's investment adviser, Oppenheimer Management Corporation (the "Adviser"), Oppenheimer & Co. which controls the Adviser and the directors of the Fund. The complaints in the three lawsuits each charged that certain unregistered securities purchased by the Fund, an open-end investment company, were (1) acquired improperly and without adequate disclosure and (2) were valued improperly. The complaints also charged that management fees paid to the Adviser were excessive in that they were allegedly based on a false and exaggerated net asset value and investment performance. The suits, which do not seek damages from the Fund, (A-19-20, 35-36, 45) seek recovery of the alleged excessive management fees, cancellation of the investment advisory agreement and counsel fees for the attorneys for plaintiff, as well as damages suffered by plaintiffs and all other similarly interested shareholders. All three actions were consolidated on December 17, 1969.

In 1973, the defendants properly served filed amended answers (A-47-81) to the complaints, denying the

alleged unlawful and/or improper conduct and asserting affirmative defenses, among others, that there was fair, adequate and timely disclosure of the investments in investment letter securities, the value of such securities was determined in good faith by the Board of Directors of the Fund, and such value was the fair value of such securities in accordance with applicable law. In addition, the defendants, if held liable to plaintiffs by reason of overvaluation of restricted securities owned by the Fund, have asserted claims against plaintiffs for all amounts received by plaintiffs or to which plaintiffs are entitled to the extent such amounts were received by plaintiffs on redemptions of the Fund's securities as a result of overvaluation of restricted securities and setting off such amounts against any amounts for which defendants may be liable. (A-55-56, 58, 70-72, 80-82) Plaintiff Taussig was one of the shareholders who redeemed shares throughout the period designated by plaintiffs (A-112-13). Furthermore, as another affirmative defense, defendants other than the Fund have claimed an offset against the Fund for net amounts received by the Fund as a result of the alleged overvaluations against any damages to which they may be held liable to the Fund (A-57,81).

B. The Class Action Motion

1. The Initial Motion

On March 30, 1973, plaintiffs served a notice of motion and supporting affidavit (A-116-128) for an order pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure ("FRCP"), declaring that this consolidated action be maintained as a class action. In their motion papers, plaintiffs submitted that "any costs relating to the notice such as the preparation of the notice should be paid by the defendants since the defendants are better able to bear the cost of the notice" (A-127). Plaintiffs also suggested that the determination as to who should pay such costs or allocation thereof be deferred pending the submission of plaintiffs' motion for summary judgment ³ (A-127) and submitted that it would be a fair exercise of discretion for the Court under the circumstances of the case to require the defendants to pay the cost of notice (A-127).

The defendants responded to plaintiffs' motion, pointing out that the effort and expense involved in ascertaining and giving notice to the members of the

³ No such motion was ever made, probably because of the material issues of fact in dispute (See e.g. A-135-36).

class could be expected to be considerable since there were approximately 121,000 shareholders accounts which purchased Fund shares during the March 28, 1968 - April 24, 1970 period designated by plaintiff for determining members of the class (A-133). The Court was informed that it would require "considerable labor and expense to ascertain the names and addresses of all such purchasers, since the current list of shareholders of the Fund includes many who are not members of the class and a considerable number of members of the class are probably no longer current shareholders" (A-133-34). Furthermore the defendants objected to a mailing to all current shareholders, as suggested by plaintiff's counsel, because such a mailing would (1) not reach members of the class who are no longer shareholders, (2) be received by many shareholders who are not members of the class and be likely to cause substantial damage to the Fund and its shareholders by causing unsophisticated shareholders to panic and redeem their shares on the belief their investments are endangered, and (3) result in substantial cost (A-134). The defendants also pointed out that there was no showing plaintiffs would be able to reimburse defendants for such costs in the event plaintiffs did not prevail (A-135).

2. The Supplemental Information
Following Eisen III.

On May 1, 1973 this Circuit decided Eisen III, supra in which it (1) held, among other things, that the class action involved in the Eisen litigation was unmanageable and did not satisfy FRCP 23 requirements and (2) reiterated its prior ruling that plaintiffs in such class actions should defray the cost of individual notice. At the hearing on the motion on May 23, 1973, defendants submitted an affidavit of an officer of the Fund and Advisor (A-138-41) which stated among other things, that there were over 173,000 current shareholders of the Fund, approximately 121,000 persons who purchased shares during the period designated by plaintiffs and at least 68,491 persons now shareholders who were not members of the class specified by plaintiffs (A-139). This indicated that there were about 16,000 persons whose shares had been entirely redeemed and were no longer shareholders. To avoid injury to the Fund, the officer urged that the mailing only be made to members of the class, pointing out the loss of investor confidence in the stock market in 1973 and the trend of redemptions in excess of sales of mutual fund shares, including those of the Fund (A-140).

3. The Discovery Relating
to the Class Notice

On July 18, 1973, a full day was spent in Boston taking the deposition of the Fund's transfer agent, Investment Company Services Corporation ("ICSC") (A-195-257). The significant facts ascertained or affected by this deposition are as follows:

(a) As of August 31, 1973, the Fund had 171,195 shareholders of whom approximately 68,000 shareholders were not members of the class designated by plaintiffs. Accordingly, about 103,195 shareholders, as of August 31, 1973, were members of the class.

(b) There were approximately 121,000 present or former shareholders who were members of such class.

(c) There were approximately 17,800 shareholders who were members of the class and no longer shareholders of the Fund.

(d) The transfer agent, ICSC, could devise programs and procedures for determining the identity and addresses of members of the class. These programs would segregate current share-

holders who were members of the class from those who were not members.

(e) On the basis of rates in effect in 1973, the estimated cost, to ICSC, of establishing these programs and procedures, involving programming, key punch operations, computer time, card costs, supervision and other items approximated \$16,580, exclusive of mailing costs. The costs of inserting the notice would amount to one cent per insert so that a separate mailing of a card with the shareholder's name imprinted thereon and the notice would be \$2,420 (two inserts) and \$9,680 in first-class postage (based on the then first class rate of eight cents an ounce and exclusive of the cost of printing the notice and envelopes). Thus, the total cost of a separate mailing by plaintiffs in 1973 would have required an approximate outlay of \$28,500 by them.

4. The Modification Sought by Plaintiffs
To Avoid the Cost of Notice

In December 1973, plaintiffs sought to modify their class action application relating to the description of the class by excluding persons who purchased shares during the

period designated by plaintiffs who no longer were shareholders of the Fund (A-142-50). By this application, plaintiffs sought to (1) avoid complications raised by defendant's affirmative defense for setoffs on redemptions of such shares to the extent the redemptions were at excessive prices caused by the alleged overvaluation of restricted securities and (2) eliminate the cost of notice to these persons and reduce the overall costs of notice which would otherwise be in excess of \$20,000 (A-143-44). Plaintiffs claimed the proposal, if permitted, would also facilitate the distribution of any recovery -- only to existing shareholders (A-144). Furthermore, in order to substantially reduce their costs of notifying the class originally designated by them, plaintiffs proposed that the class notice be inserted in a regular mailing to all shareholders of the Fund (approximately 171,000 persons of whom only 103,000 were members of the class) (A-145-46). Plaintiffs were willing to pay the one cent per insert charge and the expense of preparing the notice, estimated to cost approximately \$5,000 (A-147). Plaintiffs unequivocally stated that, if required to pay the costs of ascertaining the members of the class and mailing notice solely to them at an expense in excess of \$20,000, they could not afford to pay such cost and would be "unable to continue prosecution

of this consolidated action as a class suit" (A-144).

Plaintiffs reiterated that they "are not in a position to agree to pay the costs of notice in this amount" (A-149).

These applications by plaintiffs were vigorously opposed by the defendants who insisted that plaintiffs be required to send notice directly and only to members of the class originally designated by plaintiffs if the Court ruled that the class action was manageable. The defendants pointed out the impropriety of sending notice to 68,000 persons who were not members of the class -- 40% of the Fund's existing shareholders -- and also the prejudice to the class members proposed to be excluded as well as to the Fund by a possible multiplicity of new suits. Subsequently, in July 1974, additional information was provided to the Court as to mailings by the Fund and memoranda were submitted as to who must bear the cost of discovery of identifying members of the class.

C. The Rulings of the District Court

On May 15, 1975, Judge Griesa filed an opinion on the class action motion (A-169-79). In his opinion, Judge Griesa (1) ruled that "the Fund is to be responsible for whatever work and expense is involved in providing the list of class members to plaintiffs" (A-170), (2) required

the plaintiffs to mail the necessary notices and bear such costs and (3) denied plaintiffs' application to reduce the size of the class. (A-174-75) The Court in the same opinion subsequently held that "the cost of culling out the list" of class members ... is the responsibility of defendants" (A-175) and that "it is the responsibility of defendants to cull out from their records a list of all class members and provide this list to plaintiff" (A-178). The Court had ruled that this "expense is relatively modest and it is defendants who are seeking to have the class defined in a manner which appears to require the additional expense." (A-175). The Court, noting defendants' estimate that the average recovery would range between \$2.00 and \$24.00 per shareholder and plaintiffs' claim that such averages were misleading, ⁴ also ruled that it would be inappropriate for it to declare the class claim unmanageable at this time (A-173-74).

All of the parties moved to reargue the Court's decision of May 15, 1975. In its motion, the Fund pointed

⁴ Based on Plaintiffs Further Answers to Interrogatories (which interrogatories were dated February 7, 1973) filed in October, 1975, the average damage claim appears to be \$12.24, obtained by dividing the estimated damages of \$1,481,000 claimed by plaintiffs (A-159-60) by 121,000 shareholders.

out the rulings were unclear whether the Court intended that the Fund alone bear the entire cost of culling or whether the defendants should bear the cost pro rata. The Fund argued that if the Court did not impose the cost of culling on the plaintiffs, it should (1) clarify its rulings as to which of the defendants are to bear such costs, (2) rule that such costs are taxable costs in favor of the prevailing party and (3) order plaintiffs to put up a bond in the amount of the estimated costs to protect the interests of the Fund (and its shareholders) if the Fund prevailed on the merits; otherwise the Fund would find it impossible to obtain reimbursement in such event. The Fund also requested that if the Fund be required to bear such costs, the Court's ruling should set forth that the payment at this time is an advance and that there had been no determination on the issue of contribution.

On October 1, 1975, Judge Griesa filed a so ordered memorandum, dated September 30, 1975 (A-188-90), in which he denied all motions to reargue, except that he permitted plaintiffs to have the option of including the notice in a regular mailing of the Fund, provided the notice was only sent to class members, with plaintiffs to bear the costs of mailing, including the cost of segregating the envelopes going to class members from the envelopes going to other Fund

shareholders. The Court also ruled that the costs of culling the list of class members should be borne by the Fund without prejudice to the Fund's right at the conclusion of the action to make whatever claim it would be legally entitled to make regarding reimbursement by another party.

The rulings of the District Court can be analyzed as follows:

(1) the class action rulings are "fundamental to the further conduct of the case" since plaintiffs would not prosecute their claims for \$2 or \$24 - or even \$100.

(2) review of the rulings is "separable from the merits", and

(3) the rulings will cause irreparable harm to the defendants in terms of time and money spent in defending the claims. Parkinson v. April Industries, Inc. supra, at 656.

RULE INVOLVED

Rule 23(c)(2) of the FRCP provides as follows:

"In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each members that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgement, whether favorable or not, will include all members who do not request exclusions; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

ARGUMENT

POINT I

I. IN A CLASS ACTION, THE SUBSTANTIAL COST OF IDENTIFYING MEMBERS OF THE CLASS FOR THE PURPOSES OF ENABLING PLAINTIFFS TO SEND THE INITIAL CLASS NOTICE REQUIRED BY FRCP 23(c)(2) IS A PART OF THE COST OF NOTICE TO BE BORNE BY PLAINTIFFS.

A. The Cost of Sending the Initial Class Notice to Class Members is the Responsibility of Plaintiffs.

There can be no question that in class action motions under FRCP 23(c)(2), the cost of notice is to be borne by plaintiffs. In Eisen III, supra, this Court held that:

"Our prior ruling in Eisen II is clear and specific. If identification of any number of members of the class can readily be made, individual notice to these members must be given and Eisen must pay the cost. If this cannot be done, the case must be dismissed as a class action. Amended Rule 23 (c)(2) unambiguously states that notice to the class generally shall be the "best notice practicable," and then "including individual notice to all members who can be identified through reasonable effort." Moreover, the Advisory Committee's Note states (39 F.R.D. 106-107): "Indeed, under subdivision (c)(2), notice must be ordered, it is not merely discretionary * * *." While Judge Tyler seems to have realized that this phase of amended Rule 23 has decided constitutional overtones, he apparently thought the flexibility of the Rule and our statement that the Rule was to be given a liberal interpretation authorized him to exercise his discretion even if this involved the complete disregard of our specific and unambiguous ruling on the subject of actual individual notice to identifiable members of the class. This ruling alone compels a reversal of the order appealed from and the dismissal of the case as a class action." 479 F.2d. at 1015

This Circuit is well familiar with the problems generated by the Eisen litigation on which it has also ruled

on two other separate occasions.⁵ The complexities and responsibilities of a class action seeking small amounts for an almost innumerable multitude of class members were clearly earmarked in Eisen III.

The Supreme Court in Eisen IV noted that the petitioners had "understandably declined to pay \$21,720 in order to litigate an action involving an individual stake of only \$70." 416 U.S. at 167-68.⁶ The Supreme Court reviewed the history of the notice provision under FRCP 23(c)(2) as well as the unmistakable import of the Rule that "individual notice must be sent to all class members whose names and addresses may be ascertained through reasonable effort" 417 U.S. at 173. The Court imposed that effort on Mr. Eisen on the basis that the names and addresses of the 2,250,000 members of his class "are easily ascertainable". 417 U.S. at 175.

In this action, the same applies -- the names and addresses of class members are easily ascertainable; plaintiffs merely wish to avoid the expense of this requirement. The District Court below has ignored the prevailing view

⁵ 370 F.2d 119 (2d. Cir. 1966) cert. denied 386 U.S. 1035 (1967) ("Eisen I"); 391 F. 2d. 555 (2d. Cir., 1968) ("Eisen II")

⁶ This was with respect to notice to only certain, not all, members of the class.

of this Circuit as well as New York law that these plaintiff shareholders must bear the cost of identifying members of their class. See e.g., Sirota v. Econo-Can International, Inc., 61 F.R.D. 604, 608 (S.D.N.Y., 1974); Werfel v. Kramarsky, 61 F.R.D. 674, 683 (S.D.N.Y., 1974); the District Court opinion and order contained in the Appendix to Herbst v. International Telephone and Telegraph Corporation, supra 495 F.2d 1308 at 1324-1325; Cf Reichlin v. Wolfson, 47 F.R.D. 537 (S.D.N.Y., 1969) New York Business Corporation Law §624(b). As Judge Canella of the Southern District of New York recently ruled:

"Given the choice between a rule which always imposes the cost of notice upon the plaintiff and one which always imposes it upon the defendant, this Court believes that absent legislation to the contrary, a plaintiff who has chosen to commence a class action lawsuit must accept the concomitant responsibility of initially paying for the cost of notice. In sum, there appears to be no equitably justifiable alternative to an across the board rule requiring plaintiff to pay the entire cost of notice. That such a rule will perforce prove an often insurmountable burden to class action plaintiffs is incontestable. Nonetheless, absent some device by the means of which a court could differentiate good faith suits with meritorious causes of action from unsubstantiated strike suites, no other rule would be acceptable." Popkin v. Wheelabrator-Frye, Inc. CCH Fed. Sec. L Rep. §95,068 at 97,748 (S.D.N.Y. April 11, 1975).

B. The Initial Class Notice Must Only Be Mailed to Members of the Class.

FRCP 23(c)(2) requires notice to be given to members of the class. The mailing of notice to persons who can readily be identified as not being members of the class is not sanctioned by FRCP 23(c)(2) and is an invitation to possible recurring problems not only in manageability, but also in solicitation. In some instances, District Courts in this Circuit have been faced with abuse of the court-sanctioned notification process by plaintiffs counsel, e.g. Kronenberg v. Hotel Governor Clinton, Inc., 281 F. Supp. 622, 625 (S.D.N.Y. 1968); Korn v. Franchard Corp., CCH Fed. Sec L. Rep. #92,845 (S.D.N.Y., 1970) motion to dismiss appeal denied 443 F.2d 1301 (2d. Cir. 1971), reversed in part, 456 F.2d 1206 (2d. Cir. 1972). In this case, if the Fund did not pay the cost of culling out the list of class members, the plan posed by plaintiffs and accepted by the District Court would result in notice being received by more than 68,000 persons who are not members of plaintiffs' class. Theoretically, the Court could receive 68,000 inquiries from persons not members of the class inquiring as to whether they are members and into other matters. A substantial cost could be imposed on the Fund to respond to inquiries from such shareholders if it yielded to plaintiffs' method of notice.

Moreover the ruling below, if not set aside, will result in a precedent that will establish similar problems in other class actions in this Circuit - i.e. plaintiffs sending notice to all shareholders of a defendant issuer of securities, whether or not members of the class.

We submit that there is nothing in the history of FRCP 23(c)(2) that ever suggested or intended that notice be sent directly to thousands of persons obviously not members of a class merely to save the expense of identifying class members by the "class champions". In fact, the Advisory Committee's Note to Rule 23 warned that notice "should not be used merely as a device for the undesirable solicitation of claims". See 39 F.R.D. 69, 107 (1966). Class actions involving claims with respect to damages resulting from the prices of securities paid or received by shareholders are saddled with an element not appearing in cases involving bank customers, prescription drug users or utility users - the psychological aspects of the stock market which might cause recipients of such notices to make unwise or unnecessary decisions to redeem or sell their shares.

In connection therewith, we note that in Herbst v. International Telephone and Telegraph Corporation, supra, at 1323-24, the District Court required plaintiff to bear the cost and administrative burden of providing notice to

the class. The defendants were only required to facilitate and expedite the plaintiffs task by providing the plaintiff with the requisite material in their possession. The District Court did not require notice to be sent to all shareholders of ITT.

The requirement of imposing mailing of the notice to only members of the class and requiring plaintiffs to pay the cost of identification is consistent with plaintiffs rights as shareholders under New York law. Section 624(b) of the Business Corporation Law allows a "shareholder of record ... to examine ... record of shareholders and to make extracts therefrom". In Reichlin v. Wolfson, supra the Court ruled that the plaintiff bondholder had failed to use proper discovery methods under Section 518(c) of the Business Corporation Law of New York to ascertain the number and identity of other bondholders. 47 F.R.D. at 540. That Section allows a New York corporation to confer in its certificate of incorporation the right of bondholders to inspect the corporate books and records.

In Dclgow v. Anderson, 43 F.R.D. 472 (E.D.N.Y., 1968), decided before Eisen II, the Court initially observed that notice could be given to members who were still shareholders by inserting an additional enclosure in the next communication to shareholders. Id. at 500.

However, the Court also stated that the notice provisions themselves might prove harmful to the defendants, *Id.* at 501 and required plaintiffs to make a preliminary showing that there was a substantial possibility plaintiffs would prevail on the merits. This preliminary showing requirement was ruled improper by this Circuit in Eisen III. 479 F.2d at 1016.

The significance of Dolgow here is that the District Court there recognized the potential harm to the defendants by such mailing. The Fund has good reason to believe it would be harmed by an unnecessary mailing to 68,000 of its shareholders who are not members of the class designated by plaintiffs. Accordingly, the Fund should not be required to bear the cost of avoiding such a mailing, particularly since the Fund is a nominal defendant from whom no damages are sought. It should not be required to spend more than \$16,580, about ten (10) cents for each existing shareholder,⁷ to protect itself and its shareholders from the possible prejudice. Plaintiffs, who seek as low as \$2.00 per shareholder, are obviously unwilling and unable to reimburse the Fund if the defendants prevail on the merits. See Berland

⁷ The Fund advised us that it had about 166,000 shareholders at December 31, 1975, representing a loss of 5,000 shareholders since 1973.

v. Mack, 48. F.R.D. 121, 132 (S.D.N.Y. 1969); Berse v. Berman, 60 F.R.D. 414,416 (S.D.N.Y. 1973); Popkin v. Wheelabrator-Frye, Inc., supra. Furthermore, shifting the cost on the director defendants does not safeguard the Fund and its shareholders. Those defendants will seek reimbursement from the Fund for defending the action as permitted by the indemnification provisions of the New York Business Corporation Law and there is no just reason to shift this cost to other defendants. The plaintiffs must thus bear the cost of identifying members of the Class.

POINT II

THIS ACTION IS NOT MANAGEABLE AS A CLASS ACTION

The damages sought by the plaintiffs do not arise from the Fund's inability at any time to redeem its securities because an excessive portion of its portfolio was invested in restricted securities not readily liquid to enable the Fund to have cash available for such redemptions, Matter of Mates Financial Services, CCH Fed. Sec. L. Rep. #77,790 (March 9, 1970), or in violation of the Fund's stated investment policy, Matter of Winfield & Co., Inc., CCH Fed. Sec. L. Rep. #78,530 (February 9, 1972). The claims brought by these plaintiffs are of a far different nature, based

on the alleged overvaluation of a small percentage of the Fund's portfolio (less than 10%). To establish their claims, plaintiffs must prove that thirteen (13) different securities (stocks, bonds, warrants or notes) of ten (10) different issuers were overvalued on each business day during the March 28, 1968 - April 24, 1970 period on which such securities were owned by the Fund. (None of these securities were owned for the entire period.) Such alleged overvaluations are contained in Plaintiffs Further Answers to Interrogatories filed in October, 1975 (A-154-65). To the extent plaintiffs can establish such alleged overvaluation after a jury has heard conflicting testimony from witnesses, including experts, produced by plaintiffs and defendants, they are still faced with the defense by defendants that the securities were valued in good faith. Thus, assuming that plaintiffs can overcome the monumental hurdle of establishing the overvaluations, * it is quite conceivable that the defendants will be absolved of liability because the jury will decide that they acted in good faith. In the event of such findings by the jury, the real victims will be other litigants in the Southern District of New York whose trials will have been delayed in the interim

* Plaintiffs' estimates are apparently based on their own figures, and not those of any experts retained on their behalf. (A-166-68)

and the shareholders of the Fund since the trial will cause the Fund to incur huge expenses in dollars and management man hours. All of this will occur from an action seeking to recover a minimal amount for each of the alleged victims (and large legal fees for plaintiffs' counsel).

Thus, while the District Court ruled that at this stage there has been no demonstration that the action is unmanageable, the sheer number of the 121,000 possible participants in a relatively small recovery (\$2.00 to \$24.00 each) militates against the smooth and efficient management of the action. As heretofore pointed out, if notice is mailed to 68,000 persons who are not members of the class, the cost of administration increases in responding to requests of nonmembers. See e.g., In re Hotel Telephone Charges, 500 F. 2d 86, 91-92) (9th Cir. 1974) (average claim of \$2.00 per person in the event of recovery). In addition, the costs of administration may limit the amount of any recovery for shareholders, Turoff v. Union Oil Company of California, 61 F.R.D. 51, 58 (N.D. Ohio, 1973), and in this case even exceed the recoveries by members of the class, Waldman v. Electrospace Corporation, 68 F.R.D. 281, 287 (S.D.N.Y., 1975). When the recovery to individual claimants is negligible, the class action should be dismissed. See Eisen III, 479 F.2d 1013 at 1016-18.

For two years, plaintiffs did not respond to interrogatories by the defendants seeking responses as to liability and damages. Indeed, as late as May 15, 1975, the District Court did not require plaintiffs to answer defendants' interrogatory 16 as to the claims of individual class members, stating that the time and method have to be determined by further order of the Court.⁸ That interrogatory (A-94) requires plaintiffs to, among other things, state the amount of the purchase price which was false, inflated or exaggerated for each Fund share purchase. The District Court's ruling on this item further demonstrates that the action is unmanageable.

CONCLUSION

It is respectfully urged that the Court reverse the rulings of the District Court and rule that plaintiffs must bear the cost of identifying the names of members of the class, or, in the alternative, dismiss the class action upon the ground it is unmanageable, without prejudice to the continuance of so much of the claims asserted in the complaints as refer to alleged individual rights of plaintiffs Sanders, Shaev and Taussig against defendants.

Respectfully submitted,

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⁸ This opinion is Item #39 to the Index to Record on Appeal.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Appeal Docket No. 75-7608

IRVING SANDERS,

Plaintiff-Appellee,

-against-

LEON LEVY, et al.,

Defendants-Appellants.

EGON TAUSSIG,

Plaintiff-Appellee,

-against-

MICHAEL SHAEV and RITA SHAEV,

Plaintiffs-Appellees,

-against-

ERIC HAUSER, et al.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

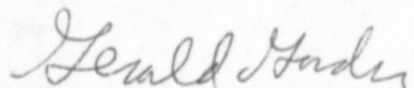
CERTIFICATION OF SERVICE

I, GERALD GORDON, an attorney admitted to practice in this Circuit, do hereby certify that, on this 9th day of January, 1976, two copies of the Brief for Defendant-Appellant, Oppenheimer Fund, Inc., were hand-delivered to the following enumerated counsel at their respective addresses:

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